United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

77-7227

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE MUSLIM COMMERCIAL BANK LTD.,

Plaintiff-Appellee,

v.

M. GOLODETZ & COMPANY and
WATERMAN STEAMSHIP CORP.,

Defendants.

PUBALI BANK, RUPALI BANK, SONALI BANK and
ADAMJEE JUTE MILLS, LTD.,

Plaintiffs-Appellants,

v.

M. GOLODETZ & COMPANY and
WATERMAN STEAMSHIP CORP.,

Defendants.

APPELLANTS' SUPPLEMENTARY BRIEF

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APPELLANTS' SUPPLEMENTARY BRIEF

This Supplementary Brief is submitted at the direction of the Court contained in the letter from the Clerk of the Court to counsel dated October 21, 1977. In that letter the Court posed nine questions to the parties. This brief will deal with those questions seriatim.

Appellants' Responses to the Questions of the Court

Q. (1) Does the appellee dispute that endorsement of the bills of lading by Adamjee to NBP (Rule 9 (g) Statement, paragraph 19, at A-14) transferred title to the jute to NBP to the extent of the Bank's security interest? If so, on what grounds?

Q. (2) In light of NBP's holding of the bills of lading, did the delivery of the jute to the consignee in the Dominican Republic on December 17 and 21, 1971 (Stipulation of Facts, items 11, 13, 15(b) and 16, at A-38-39) affect the legal position of NBP?

A. (1) and (2) These two questions are directed to appellee. In view, however, of an inquiry relevant to these questions made by the Court on oral argument, it seems appropriate to comment.

Judge Gurfein inquired as to whether counsel knew of any cases involving the confiscation of a negotiable instrument in wartime. Both counsel responded in the negative. Subsequent research has uncovered *Direction der Disconto-Gesellschaft* v. *United States Steel Corp.*, 267 U.S. 22 (1925), a case very much in point. There, plaintiff, a German corporation sued to establish ownership of a quantity of U.S. Steel Corporation stock which had been held in London for plaintiff, and which had been seized by the Public Trustee in the United Kingdom as a wartime confiscation of enemy property.

Mr. Justice Holmes, speaking for a unanimous Court, upheld the confiscation. While recognizing that the United

States had theoretical power to upset the English action, the Court pointedly observed that the United States "prefers to consider itself civilized and to act accordingly." 267 U.S. at 28. After noting the negotiable nature of the seized instruments, the Court continued:

> But the question who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holder's having given value, or taking without notice of outstanding claims, but upon the things done being sufficient by the law of the place to transfer the title. An execution locally valid is as effectual as an ordinary purchase. [Citations omitted] The things done in England transferred the title to the Public Trustee by English law.

Id. at 28-29. So it is in the instant case, the things done in Bangladesh with respect to the negotiable bills of lading transferred title to appellants by Bangladesh law.

It is beyond dispute that the assignment of the bills of lading to National Bank of Pakistan ("NBP") passed title to the jute to NBP to the extent of the Bank's security interest and, further, that the delivery of the jute to the consignee in the Dominican Republic without surrender of the bills could not affect NBP's rights in the jute, nor effectively discharge the shipping company's obligation. (See Appellants' Brief, pp. 11-14.) Thus, when appellants succeeded to title to the bills, by public acts "sufficient by the law of the place to transfer the title", they thereafter, under the holding of *Disconto-Gesellschaft*, stood precisely in the shoes of NBP. From that moment forward NBP had no property interest, and thus could transfer none.*

Q. (3) Is the armed clash in East Pakistan described in items 19 and 20 of the Stipulation of the Facts, at

---

* Since NBP was totally deprived of its interest in the bills under Bangladesh law, it thereafter possessed nothing it could transfer to Muslim Bank or to any other entity or person.

A-39-40, properly characterized as a rebellion or as a war? Does such characterization make any difference with respect to the question whether the Administration Order or the Abandoned Property Order or the Nationalisation Order (Stipulation of Facts, items 1, 21, 22, 23 and related exhibits) constituted violations of international law?

A. The armed clash in East Pakistan was a full fledged war under applicable international law and the parties were entitled to the full rights of belligerents, including the right to confiscate property of the enemy.

Every insurrection against a government in power need not necessarily rise to the status of a "war". However, where an insurrection reaches the point of an organized rebellion and takes on certain characteristics, it becomes a civil war—which is a full fledged war under the law of nations, and the combatants are entitled to exercise the rights of belligerents.

The governing legal principle was detailed in the *Prize Cases*, 67 U.S. (2 Black) 635 (1863). There, the Court was called upon to determine whether the Union blockade of Confederate ports during the Civil War was consistent with international law since blockade is lawful only during the existence of a state of war.

In ruling that the Civil War was, indeed, a war under the law of nations, the High Tribunal reasoned:

> The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other.
>
> Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful

> authority of the government. A civil war is never solemnly declared; it becomes such by accidents—the number, power and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former Sovereign, the world acknowledges them as belligerents, and the contest a war.

67 U.S. (2 Black) at 666-67.

Further on, the Court observed:

> The true test of [a civil war's] existence, as found in the writing of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the courts of justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land."

Id. at 667-68. (Emphasis in original)

Finally, the Court noted:

> It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations.

Id. at 669.

See also *Miller's Executor* v. *United States,* 78 U.S. (11 Wall.) 268, 306 (1871); *Ware* v. *Hylton,* 3 U.S. (3 Dall.) 199, 224 (1796).

The permanency of property confiscations made by the rebel forces is governed by whether the rebellion succeeds.

> The validity of its Acts, both against the parent State

> and its citizens or subjects, depends entirely upon its ultimate success. If it fails to establish itself permanently, all such Acts perish with it. If it succeeds and becomes recognized, its Acts from the commencement of its existence are upheld as those of an independent nation. Such was the case of the state governments under the old confederation on their separation from the British Crown. Having made good their Declaration of Independence, everything they did from that date was as valid as if their independence had been at once acknowledged. Confiscations, therefore, of enemy's property made by them were sustained as if made by an independent nation.

Williams v. *Bruffy*, 96 U.S. (6 Otto) 176, 186 (1878). See *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302-03 (1918); *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 308-09 (1918).

Bangladesh has met all of the criteria outlined in the *Prize Cases* and *Bruffy*, and more. The Bengali rebels not only occupied certain territory and brought the processes of government to a halt—they totally ousted Pakistan from all of East Pakistan (JA 40). Bangladesh did not merely proclaim its independence (JA 39, 159), it succeeded in achieving it. It not only fielded its own armies against its former sovereign; it also entered into alliance with neighboring India, which committed regular Indian troops to the "full scale war" (JA 39). Following the end of hostilities, the belligerents exchange prisoners, N.Y. Times, April 18, 1973, p. 1, col. 1; April 10, 1974, p. 1, col. 5; and have initiated discussions on normalizing relations. N.Y. Times Feb. 23, 1974, p. 1, col. 5; Feb. 28, 1974, p. 13, col. 1; Nov. 1, 1976, p. 5, col. 1. These are characteristic steps taken by sovereigns to end a state of war.

Another distinguishing feature of a "war" arises from a declaration of neutrality by non-participating sovereign

states. See VI Hackworth, *Digest of International Law* 166 (1943). As stated by the Court in the *Prize Cases:*

> Foreign nations acknowledge [an insurrection] as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties.

67 U.S. (2 Black) at 669. See also Restatement (Second), Foreign Relations Law of the United States § 94, Reporters' Notes 1 (1965). The determination by the political branch as to whether a state of war exists is conclusive upon the courts. *Prize Cases,* 67 U.S. (2 Black) at 669-70.

The Government of the United States recognized the existence of a state of war in East Pakistan by adopting a position of neutrality. See *U.S. Foreign Policy for the 70's, the Emerging Structure of Peace: A Report to the Congress by Richard Nixon,* Feb. 9, 1972, at 148. Indeed, Appellee concedes that "full scale war" raged in East Pakistan (JA 39). See Appellee's Brief, at 2.

In sum, the conduct of the belligerents, the level of warfare, the outcome of the war, the pronouncement of neutrality by the United States and the concession of appellee that full scale war was raging, compel the conclusion that a state of war, as that term is recognized under the law of nations, existed in East Pakistan. The Administration Order, the Abandoned Property Order and the Nationalization Order of the Sovereign State of Bangladesh (JA 162, 164, 54) no more constituted breaches of international law than did the confiscations of the struggling American rebels described in *Ware* v. *Hylton,* supra, or the numerous U.S. confiscations of enemy alien property during and after World War I and World War II. As the Supreme Court made clear in the *Prize Cases,* international law draws no distinction between a rebellion which ripens into war and a war between sovereign states.

Q. (4) If Pakistan and Bangladesh were at war, how long—given the cessation of combat on December 16, 1971—did the state of war continue?

A. The state of war between Bangladesh and Pakistan continues until terminated by formal treaty or other declaration by the parties.

While the termination of hostilities is a military fact, the end of a state of war is strictly a political decision. It would be extraordinary if the end of hostilities and the termination of the state of war were contemporaneous.

> War does not cease with a cease-fire order, and power to be exercised by the President . . . is a process which begins when war is declared but is not exhausted when the shooting stops. [Citations omitted]. "The state of war" may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act.

Ludecke v. *Watkins,* 335 U.S. 160, 167-69 (1948). Accord, *Hamilton* v. *Kentucky Distilleries and Warehouse Co.,* 251 U.S. 146 (1919); *McLeod* v. *United States,* 229 U.S. 416 (1913); *United States* v. *Anderson,* 76 U.S. (9 Wall.) 56 (1870); VI Hackworth, *Digest of International Law* 428-29, 432-33 (1943). Indeed, the United States continued to confiscate the property of German nationals well after the cessation of hostilities during World War II. *National Savings and Trust Co.* v. *Brownell,* 222 F.2d 395 (D.C. Cir.), cert. denied, 349 U.S. 955 (1955). Cf. *Commercial Trust Co.* v. *Miller,* 262 U.S. 51, 57 (1923). See also *Ludecke* v. *Watkins,* supra.

Military action between Pakistan and Bangladesh ceased on December 16, 1971 (JA 40). The confiscations in issue all were effected within less than four months after the cease fire, but before any steps whatever were taken toward a restoration of the peace. Indeed, prisoners of war were not exchanged until over a year later. See N.Y. Times, April 18, 1973, p. 1, col. 1; April 10, 1974, p. 1, col. 5.

Even today, the combatants inch toward a treaty which will end the state of war. Pakistan has granted recognition to Bangladesh (JA 41); N.Y. Times, Feb. 23, 1974, p. 1, col. 5. Satellite tele-communications links between the two countries have been initiated following negotiations. N.Y. Times, Nov. 1, 1976, p. 5, col. 1. As stated in the affidavit of Ambassador Kaiser which accompanies this brief ("Kaiser Affidavit"), negotiations are continuing to deal with various outstanding problems (Kaiser Affidavit, ¶ 3), the resolution of which are precedent to the making of a peace treaty—the political act which will end the state of war. Indeed, he notes that this very case is under discussion. (Ibid.)

Q. (5) What action, if any, has been taken by Pakistan with respect to property in Pakistan owned by citizens of what has become Bangladesh?

A. Pakistan has on a massive scale confiscated all property in Pakistan owned by Bangladesh nationals, retroactive to December 16, 1971. Pakistan Abandoned Properties Act, 1975, § 3, Gazette of Pakistan, Extraordinary, February 17, 1975. (a copy of the decree is annexed as Exhibit A to the Kaiser Affidavit). The confiscated properties include securities, bank deposits, insurance contracts, actionable claims and real estate. The Act makes no provision for compensation, nor has compensation been paid. Kaiser Affidavit, ¶ 5.*

Q. (6) Does the United States' recognition of Bangladesh on April 4, 1972 or Pakistan's recognition of Bangladesh (Stipulation of Facts, items 24 and 25, at A-41) have any

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* Pakistan has also nationalized all Pakistan chartered banks, as well as insurance companies in Pakistan, whether owned by Pakistanis or aliens, but in both instances, unlike the case of Bangladesh assets, the nationalization decrees provided for compensation. The Banks (Nationalization) Act, 1974 § 6, Gazette of Pakistan, Extraordinary, Part I, 11th March, 1974; The Life Insurance (Nationalization) Order, 1972, § 39, Gazette of Pakistan, 20th March 1972.

bearing on the rights of the parties? Cf. *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302-03 (1918); *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 308-09 (1918), where the beneficiary of the expropriation did not seek affirmative relief in a United States court.

A. Recognition of Bangladesh by the United States was a necessary requisite to affording Bangladesh access to United States courts. See Restatement (Second), Foreign Relations Law of the United States § 107, comment e and Reporter's Note. However, once recognition has been granted, no distinction is drawn between the use of U.S. courts on an affirmative basis or for defensive purposes by the newly recognized state. Recognition of a sovereign validates, for all purposes, the acts of that state from the date it first existed. In *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302-03 (1918), the Supreme Court, when faced with recognizing the forces of the confiscation of leather by the government of Mexico effected at a time when that government was nothing more than a rebellious army, stated the "relation back" doctrine in its classic form:

> [W]hen a government which originates in revolution or revolt is recognized by the political department of our government as the de jure government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.

Accord, *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 308 (1918); *Underhill* v. *Hernandez*, 168 U.S. 250, 253 (1897); *Williams* v. *Bruffy*, 96 U.S. (6 Otto) 176, 186 (1878); I Hackworth, *Digest of International Law* 381 (1940).

Significantly, the relation back rule does not distinguish between kinds of actions or conduct, nor does it draw distinctions limiting the total permitted impact of such actions or conduct. Recognition retroactively validates

"all the actions and conduct" of the government recognized back to the moment it came into existence—even though, at the time existence commenced, it was merely a rebel force.

The United States recognized Bangladesh on April 4, 1972 and Pakistan recognized Bangladesh on February 22, 1974. (JA 41) At the moment of recognition, the acts and conduct of that State, for all purposes, achieved retroactive validity to the commencement of its existence. Moreover, the confiscations in issue were effected after the government of Bangladesh was in control of its territory and was actually governing. (JA 14-15) See Restatement (Second), Foreign Relations Law of the United States § 114 (1965).

Q. (7) What is the effect of Article 8 of the Nationalization Order quoted in Item 23 of the stipulation of facts on the issue of confiscation? Have there been any developments with respect to compensation since the date of the stipulation and the statement under Rule 9(g) (item 26)?

A. Article 8 of the Nationalization Order has not yet been interpreted by the Bangladesh Courts. (Kaiser Affidavit ¶ 4) Its applicability in the present context would appear to be questionable since its language appears to exclude banks vested under earlier laws. (JA 41)

While a definitive agreement has not yet emerged from discussions, the very fact that both parties have indicated a willingness to negotiate a settlement of their reciprocal confiscations and the subject is on the agenda, suggests forward movement subsequent to the stipulation and Rule 9(g) statement.

Q. (8) Are there any pending negotiations between Pakistan and Bangladesh for the settlement of claims such as those here in suit or arising out of such acts of Pakistan as are described in item (5) above?

A. As stated in the affidavit of Ambassador Kaiser, negotiations for the settlement of claims arising from confiscations by Bangladesh and Pakistan are on the negotiating agenda and have already been discussed. Further discussions are to be held in the future. (Kaiser Affidavit, ¶ 3)

Q. (9) Would it be proper and, if so, appropriate for the court of appeals to vacate the order of the district court without prejudice and direct the district court to suspend judgment for a reasonable time to allow for negotiations such as are described in item (8) above?

A. Research has failed to disclose authority precisely dispositive of the question of whether this Court may vacate the District Court's Order, without prejudice, pending the process of diplomatic negotiations. However, decisions dealing with federal judicial deference to state legal proceedings in matters primarily involving interpretation of state law, are persuasive by analogy.

The federal abstention doctrine does not question the power of the federal courts to deal with important questions of state law; that power unquestionably exists. Rather, it is a doctrine grounded in judicial restraint and discretion where important and novel questions involving the law of another jurisdiction are primarily involved. While the federal court retains jurisdiction, the parties are given a reasonable opportunity to resolve their dispute without federal intervention. *Martin* v. *Creasy*, 360 U.S. 219 (1959). See generally *Landis* v. *North American Co.*, 299 U.S. 248 (1936). The doctrine is properly applicable whether or not a state proceeding is pending. *City of Meridian* v. *Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639 (1959). Expropriation proceedings involving, as they do, prerogatives of sovereignty, are particularly appropriate subjects for application of federal abstention. *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U.S. 25 (1959).

True, the instant case does not involve a State of the Union. Yet it directly involves the sovereignty of a foreign state—indeed, of two foreign states. The instant case does not invoke difficult questions of federal-state relations involving complex constitutional principles in their interrelationships with state law. But it does involve the application of constitutionally grounded public policy to frustrate the laws of a foreign sovereign as applied to foreign nationals. These laws have yet to be authoritatively interpreted by the jurisdiction of their birth. Were the Court to stay its hand, it would not be doing so pending the prosecution of a judicial proceeding in another jurisdiction. Rather, it would be deferring to the exigencies of international diplomacy. However, given that a prime purpose of the abstention doctrine is to afford the sovereign most concerned the opportunity to resolve the dispute, whether that resolution is accomplished in a judicial or political forum should not be crucial to the determination as to whether abstention is appropriate.

While diplomatic negotiations are not judicial proceedings, these means used by belligerent sovereigns to settle disputes such as those in issue here are worthy of judicial deference. Indeed, as a general matter, diplomatic negotiation is the normal procedure resorted to by nation states to resolve their disputes. See, e.g., Convention on the Settlement of Matters Arising Out of the War and Occupation (Federal Republic of Germany), Oct. 23, 1954, ch. 6, art. 3 (1), [1955] 4 U.S.T. 4411, T.I.A.S. No. 3425; which disposed of World War II consfications. Surely given this Court's ephemeral relationship to the parties and to the dispute, it would seem an appropriate exercise of the Court's inherent power over its own processes to defer a determination on the merits pending diplomatic negotiations.

The diplomatic process is not a rapid one. Should voluntary abstention be applied here, this factor should be taken into account in setting a reasonable time to allow for negotiations. In *Bangladesh Bank* v. *Brown Brothers*

Harriman Co., 75 Civ. 375 (CLB) (S.D.N.Y.), to afford diplomacy an opportunity to succeed, the case has been placed on the suspense calendar. The parties have agreed to notify the Court in the event negotiations are broken off or the matter is settled. A similar procedure would seem appropriate here.

Conclusion

The instant case presents to this Court the rather unique situation of a wartime dispute between two foreign sovereigns over title to property located on distant shores. There are few fact situations that one could create with which a United States court would have less substantive connection than the instant one. One would be equally hard pressed to evolve a situation less appropriate than the present one for the application of United States substantive law.

Under the authority of the *Disconto-Gesellschaft* case, supra, and in accordance with basic conflict of laws principles, the substantive law of Bangladesh should govern the disposition of this dispute. If this Court nonetheless deems it appropriate to disregard those principles—it is respectfully submitted that this action should be dismissed. At minimum, the Order of the District Court should be vacated and the parties afforded the opportunity to resolve the dispute through diplomatic negotiations.

Dated: New York, New York
December 16, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 16th day of December, 1977, he served two copies of Appellants' Supplementary Brief on Debevoise, Plimpton, Lyons & Gates, the attorneys for Appellee by delivering to and leaving same with a proper person in charge of their office at 299 Park Avenue in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this
16th day of December, 1977.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978